

# International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events

*Towards an All-Hazards Approach*

*Edited by*

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This volume was funded by DIRPOLIS Istituto Scuola Superiore Sant'Anna. 2) Dipartimento di Scienze Giuridiche – Alma Mater Studiorum Università degli Studi di Bologna. 3) Dipartimento di Scienze Giuridiche – Università degli Studi di Firenze. 4) Dipartimento di Giurisprudenza – Università degli Studi di Torino

The Library of Congress Cataloging-in-Publication Data is available online at <https://catalog.loc.gov>

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: [brill.com/brill-typeface](http://brill.com/brill-typeface).

ISBN 978-90-04-50798-2 (hardback)

ISBN 978-90-04-50799-9 (e-book)

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This book is printed on acid-free paper and produced in a sustainable manner.

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# Regional Perspective: CBRN Terrorism-Related Obligations under European Union Law

*Susanna Villani*

## 1 Introduction

The fight against terrorism has traditionally been perceived as a domestic security concern, but the terrorist attacks in the US and the EU in the early 2000s were the trigger for a new and unprecedented climate of cooperation between the EU Member States and the EU institutions in that field. The general reticence to abandon control over terrorist threats at national level gave way to an increased desire for a common strategy for overcoming the weaknesses in national and supranational emergency preparation and response. Such an enhanced political focus on terrorism also made it possible to accelerate decision-making processes on specific dimensions of intervention, including law enforcement and judicial cooperation, intelligence cooperation, border controls and the adoption of measures for combating the financing of terrorism.<sup>1</sup> The EU as a whole has thus acquired an increasingly important role as an actor in counter-terrorism practices based on the four strategic ‘pillars’ covering prevention, preparedness, response and recovery to be built alongside the Member States’ action.

1 A selection of relevant contributions would include: M den Boer and J Monar, ‘Keynote Article: 11 September and the Challenge of Global Terrorism to the EU as a Security Actor’ (2002) 40(4) *JComMarSt* 11; D Keohane, *The EU and Counter-Terrorism* (CER 2005); D Spence (ed), *The European Union and Terrorism* (John Harper 2007); R Bossong, ‘The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance’ (2008) 46(1) *JComMarSt* 27; M O’Neill, *The Evolving EU Counter-terrorism Legal Framework* (Routledge 2011); J Argomaniz, *The EU and Counter-Terrorism: Politics, Polity and Policies After 9/11* (Taylor & Francis Group 2011); C Eckes, ‘The Legal Framework of the European Union’s Counter-Terrorist Policies: Full of Good Intentions?’ in C Eckes and T Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (CUP 2011) 127; C Murphy, ‘EU Counter-terrorism Law: What Kind of Exemplar of Transnational Law?’ (2019) 21 *CYELS* 217.



Against this backdrop, the threats posed by CBRN material have progressively become an integral part of the EU counter-terrorism strategy.<sup>2</sup> As early as 2010, the Internal Security Strategy<sup>3</sup> put forward a shared agenda for Member States, the EU institutions, and agencies like Europol, as well as civil society and local authorities, envisaging the implementation of measures against CBRN risks as a priority. The terrorist attacks that occurred in Europe from 2015 onwards, as well as sporadic events like the toxic chemical attack in Salisbury in 2018, have confirmed the need to consciously introduce the nexus between CBRN and security, be the threat posed by States or non-State actors. Even though terrorists have tended to use commercial or homemade explosives, CBRN agents such as sarin, ricin or anthrax also represent a serious threat, especially when acquired through illicit trafficking that may be difficult to detect. Although 2019 saw a downward trend in terrorist attacks, the threat remains high and terrorist groups are progressively developing the knowledge and capacity to weaponise CBRN materials.<sup>4</sup> The intention to carry out terrorist attacks using this kind of material also continues to appear on terrorist online forums and social media, via cloud-based instant messaging services promoting and explaining the use of biological weapons.<sup>5</sup> The fact that terrorist groups are developing the knowledge and capacity to acquire and use CBRN materials represents an 'evolving threat' for the EU. Since it is increasingly real both inside and outside the EU, multiple actions and strategies in the realm of the CBRN management cycle have been adopted, with attention not only to the phase of response but also to those of prevention, preparedness and recovery. In July 2020, the European Commission renewed the EU Security Union Strategy,<sup>6</sup> which focuses on priority areas ranging from combating terrorism and organised crime, to preventing and detecting hybrid threats and increasing the resilience of critical infrastructure, to promoting cybersecurity and fostering research and innovation. The strategy also calls for major cooperation and

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2 C Kaunert and S Léonard, 'The European Union's response to the CBRN terrorist threat: A multiple streams approach' (2019) 65(3) *Politique européenne* 148.

3 Communication from the Commission to the European Parliament and the Council, *The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*, COM(2010) 673 final.

4 Europol, *European Union Terrorism Situation and Trend Report (2020)*.

5 *Ibid* 21.

6 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy, COM(2020) 605 final.

coordination at EU level, especially when terrorism acquires a cross-border and sectoral dimension, like that concerning CBRN-related threats.<sup>7</sup>

The following sections describe the EU's approach to CBRN threats linked to terrorist acts, beginning with an overview of the EU's competences in the field of terrorism and of the EU's general strategy in this domain. The core of the chapter will be an exploration of the possibilities for developing specific obligations of prevention, preparedness, response and recovery for the EU Member States by proposing potential scenarios in light of the soft strategy encapsulated in the EU CBRN Action Plans. Finally, a description of the initiatives of international cooperation, as evidence of the close link between the internal and the external dimension of security, will be provided. Some concluding remarks will then follow.

## 2 The 'Soft' Strategy against CBRN Threats at EU Level as a Mirror of the Division of Competences in the Field of Terrorism

The Lisbon revision introduced specific provisions for EU action in the area of counter-terrorism, thereby widening the EU's competences and upholding the institutional framework.<sup>8</sup> In particular, Article 83 TFEU lists terrorism among the serious crimes with a cross-border dimension, thus allowing the possibility to establish common minimum rules. However, the Union's competence is not aimed at a full harmonisation of issues like the fight against terrorism. From an EU constitutional point of view, this is also confirmed by the so-called 'national identity clause' enshrined in Article 4(2) TEU, which states that 'national security remains the sole responsibility of each Member State'<sup>9</sup> and by Article 72 TFEU, which recognises national prerogatives over maintaining law and order and safeguarding internal security.<sup>10</sup> Hence, the area of combating terrorism does not form an ordinary shared competence, but rather one in which the joint action depends heavily on the willingness of Member States that remain the principal actors in this domain. In this equilibrium of competences, Article 222 TFEU deserves particular mention as it

7 M Martellini and A Malizia (eds), *Cyber and Chemical, Biological, Radiological, Nuclear, Explosives Challenges* (Springer 2017).

8 C Eckes (n 1) 127.

9 G Di Federico, *L'identità Nazionale degli Stati Membri nel Diritto dell'Unione Europea. Natura e portata dell'art. 4, par. 2, TUE* (Editoriale Scientifica 2017).

10 For detailed insights, ch 6, para 3 by Casolari.

imposes specific obligations of cooperation and solidarity upon the Union and the Member States in case of emergency. However, notwithstanding its potential, the 'solidarity clause' still remains underdeveloped.<sup>11</sup>

The limited margin of manoeuvre of the EU, determined by the division of competences with the Member States as well as the fact that no primary law provision deals specifically with CBRN-related threats, is clearly reflected in the soft instruments the EU has adopted over the years.

### 2.1 *The Elaboration of an EU 'Soft' Strategy against CBRN Threats*

The first political and programmatic strategy intended to guarantee closer cooperation and coordination on CBRN-related aspects was proposed at the European Council meeting held in Ghent in 2001.<sup>12</sup> Highlighting the fight against CBRN terrorism as an important area for EU action, alongside the five priorities of the Anti-terrorism Roadmap,<sup>13</sup> the Heads of State and Government urged the Commission and the Council 'to prepare a programme to improve cooperation between the Member States on the evaluation of risks, alerts and intervention, the storage of such means, and in the field of research'.<sup>14</sup> Following these indications, they adopted a joint programme to improve cooperation in the EU for preventing and limiting the consequences of CBRN terrorist threats,<sup>15</sup> which was subsequently revised and widened by the Council and Commission's Solidarity Programme,<sup>16</sup> following the 2004 attacks in Madrid. Moreover, tackling terrorists' access to weapons and explosives, ranging from components for homemade explosives to CBRN material, was also seen as a key action under the EU Strategy Against Proliferation of Weapons of

11 M Gestri, 'La clausola di solidarietà europea in caso di attacchi terroristici e calamità (art. 222 TFUE)', *Studi in onore di Luigi Costato* (Jovane 2014) 537.

12 European Council, Declaration by the Heads of State or Government of the European Union and the President of the Commission, Follow-Up to the September 11 Attacks and the Fight Against Terrorism, Doc. SN 4296/2/01.

13 European Council, Anti-terrorism Roadmap (2001) Doc. SN 4019/01. The roadmap included specific priorities of the EU counter-terrorism policy, namely police and judicial cooperation, international legal instruments, measures against the financing of terrorism, air security, and the coordination of the EU's global action.

14 Doc. SN 4296/2/01 (n 12), point 4.

15 Council of the European Union, Adoption of the programme to improve cooperation in the European Union for preventing and limiting the consequences of chemical, biological, radiological or nuclear terrorist threats, Doc. 14627/02.

16 Council of the European Union, EU Solidarity Programme on the consequences of terrorist threats and attacks (revised/widened CBRN Programme): Adoption, Doc. 15480/04.

Mass Destruction (WMD)<sup>17</sup> and the 2005 EU Counter-Terrorism Strategy.<sup>18</sup> In 2007, the Green Paper on bio-preparedness launched a consultation process on how to improve the EU's preparedness and response to biological threats of both non-terrorist and terrorist origin.<sup>19</sup> This process was given additional impetus by the 2007 Council Conclusions on addressing CBRN Risks and on Bio-preparedness.<sup>20</sup> On the basis of a Commission Communication,<sup>21</sup> in 2009, the Council formally adopted an EU CBRN Action Plan,<sup>22</sup> which represented the first political commitment based on a roadmap of intentions for reducing the threat of and damage from CBRN incidents of accidental, natural and intentional origin. The Action Plan identified and detailed the three areas of intervention that make up the CBRN risk management cycle, and stressed that these areas are to be read according to an all-hazards approach that respects the primary responsibility of the Member States and is 'guided by the principle of solidarity'.<sup>23</sup> The 124 different fields of action financially supported through existing Community programmes and instruments were listed in Annex 1 of the Action Plan. In addition, the recommendations included the monitoring of industrial use of high-risk chemicals, the identification of facilities having biological agents, and the improvement of security checks of personnel handling chemical or biological agents.<sup>24</sup> The Action Plan was

17 Council of the European Union, Fight against the proliferation of weapons of mass destruction – EU strategy against proliferation of Weapons of Mass Destruction, Doc. 15708/03. For an overview of the tools adopted until 2018, see Annex 11 to the Annual Progress Report on the Implementation of the European Union Strategy Against the Proliferation of Weapons of Mass Destruction (2018), Doc. 7909/19, Add. See, K Zwolski, 'Unrecognized and Unwelcome? The Role of the EU in Preventing the Proliferation of CBRN Weapons, Materials and Knowledge' (2011) 12 *Perspectives on European Politics and Society* 477.

18 The strategy underlines the importance of working 'with partners and international organisations on [...] non-proliferation of CBRN materials [...], as well as [providing] technical assistance on protective security to priority third countries'. See, Council of the European Union, The European Union Counter-terrorism Strategy, Doc. 14469/4/05, point 11.

19 Green Paper on bio-preparedness, COM(2007) 399 final.

20 Council Conclusions of 6 December 2007 on addressing Chemical, Biological, Radiological and Nuclear Risks and on Bio-preparedness, Doc. 16589/07.

21 Communication from the Commission to the European Parliament and the Council on Strengthening Chemical, Biological, Radiological and Nuclear Security in the European Union – an EU CBRN Action Plan, Doc. 11480/09.

22 Council of the European Union, Council Conclusions on strengthening chemical, biological, radiological and nuclear (CBRN) security in the European Union – An EU CBRN Action Plan: Adoption, Doc. 15505/1/09 REV 1.

23 Ibid Annex I, 9.

24 See ch 14 by Ferri.

intended to be implemented by EU bodies, such as the European Commission, the EEAS and Europol; Member States' public authorities; and other relevant stakeholders, such as the private sector, the health care sector, and academic institutions. The CBRN Advisory Group was established to coordinate the work, alongside subgroups for coordinating issues related to chemical, biological, radiological and nuclear security, respectively.

In May 2012, the European Commission issued the first 'Progress Report on the Implementation of the EU CBRN Action Plan',<sup>25</sup> identifying both achievements and shortcomings. As well as a better understanding of the nature of these threats generally, the report acknowledged that progress had been made on increasing information sharing by means of a CBRN Glossary and inclusion of CBRN incidents in the European Bomb Data System. In addition to these achievements, the report listed projects that had been implemented at local, national, EU and international level, based on assessment of the relevant risks. These efforts included establishing the European network of specialised CBRN law enforcement units;<sup>26</sup> setting up the Early Warning System (EWS) for law enforcement authorities for incidents related to high risk CBRN materials; as well as creating a dedicated EU training infrastructure, the European Nuclear Security Training Centre (EUSECTRA). In addition, following the outcomes of the 2012 conference 'Strategic EU-level CBRN-E Conference: A New EU-CBRNE Agenda',<sup>27</sup> which underlined the need for a flexible approach encompassing also the explosive (E) materials,<sup>28</sup> the scope of the Action Plan was informally widened, thus paving the way to the adoption of a new EU CBRN-E Agenda.<sup>29</sup>

25 European Commission, Progress Report on the Implementation of the EU CBRN action plan, May 2012 (public version).

26 Council conclusions on the creation of a European network of specialised CBRN law enforcement units 3096th Justice and Home Affairs Council meeting Luxembourg, Doc. 10338/11.

27 The Conference was organised in order to discuss the preliminary achievements of the Action Plan on Enhancing the Security of Explosives adopted in 2008 that was essentially aimed at preventing the use of explosive devices by terrorists.

28 Council of the European Union, An Action Plan on Enhancing the Security of Explosives, Doc. 8109/08. After the Paris attacks, another Action Plan against illicit trafficking in and use of firearms and explosives was adopted (Communication from the Commission to the European Parliament, the European Council, the Council, Implementing the European Agenda on Security: EU action plan against illicit trafficking in and use of firearms and explosives, COM(2015) 624 final). Regulation (EU) 2019/1148 of the European Parliament and the Council on the marketing and use of explosives precursors (OJ L 186, 11.7.2019) was adopted in 2019 and started to be applied from 1 February 2021.

29 Council of the European Union, Draft Council Conclusions on the new CBRNE agenda – Adoption, Doc. 16980/12. R Roffey, 'The EU as an Actor in CBRNE Crisis: A General

As for the financing terms, the EU Instrument for Stability 2014–2020<sup>30</sup> funded a number of measures to promote CBRN security practices, strengthen effective control of illicit CBRN trafficking, and enforce export control on dual-use goods.<sup>31</sup> Furthermore, the Commission introduced a new and comprehensive approach for elaborating a strategy<sup>32</sup> to deter future CBRN-E risks at EU level, paving the way for the adoption of a specific Action Plan to enhance preparedness against CBRN security risks.<sup>33</sup> More than in the previous documents, the 2017 Communication elaborating this specific Action Plan included prominent references to the use of CBRN materials by terrorist groups as an ‘evolving threat’ for the EU and thus the necessity to focus on shared preparedness strategies. In order to effectively counter such a threat, four priorities were identified: 1) reducing the accessibility of CBRN materials; 2) ensuring a more robust preparedness for and response to CBRN security incidents; 3) building stronger internal-external links in CBRN security with the key regional and international EU partners; and 4) enhancing the knowledge of CBRN-related risks. Each of these objectives was then related to specific commitments, actions and deliverables to be performed in a well-defined timeframe both by civil and military assets as set out, *inter alia*, in Article 222 TFEU. Indeed, while civil protection forces are extremely relevant, using armed forces permits a comprehensive capability-based planning approach thanks to a staff that undergoes regular CBRN training. Military capabilities include specialised competencies, namely medical expertise regarding the treatment of chemical or biological casualties, detection and identification of nonconventional warfare agents, and decontamination. Accordingly, in comparison to the first CBRN Action Plan, the 2017 Action Plan seems not only to be more detailed in terms of envisaged actions but also to channel the outputs in a more structured

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Picture’, in D O’Mathúna and I de Miguel Beriain (eds), *Ethics and Law for Chemical, Biological, Radiological, Nuclear & Explosive Crises* (Springer 2019) 23.

30 Regulation (EU) No 230/2014 of the European Parliament and the Council of 11 March 2014 establishing an Instrument for Stability, OJ L 77/1 of 15.3.2014.

31 In this regard, particularly noteworthy was the adoption of Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 134 of 29.5.2009.

32 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a new EU approach to the detection and mitigation of CBRN-E risks, COM(2014) 247 final.

33 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan to enhance preparedness against chemical, biological, radiological and nuclear security risks, COM/2017/0610 final.

way thereby contributing to reinforcing the common framework for Member States' cooperative interventions that, up to that time, were not as brilliant as expected.<sup>34</sup>

### 3 Searching for Obligations in the CBRN-Related Terrorist Threats Domain

The EU Action Plans, as well as the various instruments of operational cooperation mentioned above, do not have legal force but just a programmatic character. Indeed, while demonstrating an intention to enhance both 'horizontal' coordination among Member States and 'vertical' coordination between the EU and Member States at all phases of the CBRN risk management cycle, they do not establish specific obligations either for the EU institutions or for the Member States. However, this does not automatically mean that an EU legal framework for countering CBRN terrorism is absent. As a matter of fact, on the basis of Article 83 TFEU, in 2017, the EU adopted the noteworthy Directive on combating terrorism<sup>35</sup> which, as well as reinforcing the legal framework, covers conduct related to terrorism more comprehensively by including not only the 'classical' terrorist tactics but also an explicit reference to the use of CBRN devices.<sup>36</sup> Hence, the adoption of soft law instruments represents the natural complement to the binding acts adopted at EU level, thus allowing the development of a comprehensive strategy of cooperation while respecting the division of competences. Moreover, the content of these instruments may serve to further integrate the CBRN domain within the obligations enshrined in the main secondary law instruments in the field of terrorism. Nonetheless, it must be noted that the lack of a specific set of obligations limits the opportunity to have clear-cut distinctions between the obligations to be applied to the different phases of the CBRN risk management cycle.

34 S N Chatfield, *Member States' Preparedness for CBRN Threats*, 2018.

35 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88 of 31.3.2017.

36 Ibid art 3, paras (1)(f) and (g): '(f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapon; (g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life'.

### 3.1 *Obligations of Prevention against CBRN Threats*

The main focus of the activities included in the Action Plan 2010–2015 was on the ‘prevention’ phase, concentrated on the security of CBRN materials and facilities; development of a high-security culture among staff; identification of suspicious transactions and behaviours; improvement of the security of transport; information exchange; import and export regimes; and strengthening of cooperation on the security of nuclear materials.<sup>37</sup> As a supplement to pure prevention, the ‘detection’ phase (which often may overlap with preparedness) concerns the capacity to effectively detect CBRN materials by referring to common minimum detection standards; establishing trialling, testing and certification schemes for CBRN detection; and improving the exchange of good practices for ensuring an appropriate response to an incident.

Looking at the obligations of prevention, it is firstly worth exploring Directive 2017/541 on combating terrorism, which, as mentioned, also applies to CBRN-related terrorist threats. The Directive imposes a duty on Member States to take measures to ensure that the provision of instructions on the making or use of explosives, firearms or other weapons or noxious or hazardous substances is punishable as a criminal offence when committed intentionally.<sup>38</sup> Indeed, the classification of activities that must be prevented as criminal acts in the domestic legal systems and the provision of appropriate penalties is a necessary precondition for the elaboration of preventive measures.<sup>39</sup> More broadly, besides being relevant within the criminal law domain, criminalising and punishing these offences also allows the Member States to fully comply with their obligations related to the chemical field. Indeed, following the 2018 Salisbury attacks, as requested by the European Council,<sup>40</sup> the Commission focused especially on chemical threats by stepping up its actions against

37 For insights on the management of nuclear devices, see ch 15 by Balboni.

38 Ibid arts 5–8. On specific duties of criminalisation, see ch 32 by Vierucci and ch 33 by Amoroso. As reported also by Poltronieri Rossetti (ch 7), the application of obligations of deterrence can be extended to the prevention phase in the field of CBRN terrorism.

39 On 30 September 2020, the Commission adopted a Report assessing the measures taken by the Member States. The assessment concludes that the transposition of the Directive has led to a substantive strengthening of the Member States’ criminal justice approach to terrorism, but also that the inclusion of certain types of CBRN weapons, such as radiological and nuclear weapons, is missing. See, Report from the Commission to the European Parliament and the Council based on Article 29(1) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, COM(2020) 619 final.

40 European Council Conclusions, 18 October 2018, para 8; European Council conclusions, 22 March 2018, para 11.



CBRN threats and its collaboration with Member States and developing a common list of chemical substances of concern. The Commission also launched a dialogue with the private sector to explore possibilities for reducing the accessibility to terrorists of chemical substances which can be processed or combined with other substances for chemical attacks. Additionally, in the wake of the Chemical Weapons Convention, the Foreign Affairs Council adopted Regulation 2018/1542<sup>41</sup> and Decision (CFSP) 2018/1544 concerning restrictive measures against the proliferation and use of chemical weapons.<sup>42</sup> In particular, the latter requires the States to take the necessary measures to prevent the entry into, or transit through, their territories of natural persons responsible for or involved in the use of chemical weapons, including any toxic chemicals. Again, the explicit criminalisation of this conduct within the national legal order would contribute to the implementation of this requirement by the Member States, according to a preventive approach.

Ensuring the criminalisation of conduct involving the use of CBRN material not only helps to deter potential attacks but also to set a benchmark for cooperation in the information exchange between national authorities and with the EU agencies. As a matter of fact, prevention measures are essentially based on information exchange between the competent national authorities, as established in Council Framework Decision 2006/960/JHA,<sup>43</sup> Decision 2008/615/JHA (Prüm Decision),<sup>44</sup> and Decision 2005/671/JHA.<sup>45</sup> This set of legislation imposes an obligation upon Member States to share information, calling for the creation of national contact points for the exchange of information resulting from criminal investigations of terrorist offences, including CBRN-related ones. The information, while respecting the essential security interests of the Member States, shall be sent by the national authorities to Europol and has to

41 Council Regulation (EU) 2018/1542 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, OJ L 259/12 of 16.10.2018.

42 Consolidated text: Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, OJ L 259 of 16.10.2018.

43 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386/89 of 29.12.2006.

44 Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210/1 of 6.8.2008.

45 Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, OJ L 253/22 of 29.9.2005.

contain some specific details, including details on ‘the threat posed by the possession of weapons of mass destruction’.<sup>46</sup>

Finally, according to Article 21 of the Directive on combating terrorism, the Member States are asked to take the necessary measures to ensure the prompt removal of online content constituting a public provocation to commit a terrorist offence. Following on from this provision, in 2018, the Commission proposed the adoption of a Regulation to introduce prevention measures not only against the online dissemination of material inciting terrorism but also material used for recruitment or training purposes.<sup>47</sup> The proposal enshrines specific duties of care on hosting service providers concerning the removal of terrorist content or disabling of access to it. In addition, it includes an obligation for the Member States to monitor the implementation of the Regulation. Furthermore, the Member States must inform, coordinate and cooperate with each other and, where appropriate, with relevant Union bodies such as Europol, to ensure co-ordination with regards to issuing removal orders (orders compelling hosting service providers to remove content) and referrals (which require hosting service providers to expeditiously assess content for possible removal).<sup>48</sup> As for the CBRN field, the content of the proposed act could be easily interpreted as including an obligation upon the service providers to remove online content concerning the fabrication and use of CBRN material for terrorist purposes and upon the States to collect information about these activities to be shared with the other Member States.

### 3.2 *Obligations of Preparedness against CBRN Threats*

The adoption of the 2017 Action Plan on preparedness makes it evident that there is an increasing interest in cooperating on this specific phase that is essentially based on monitoring, early warning, detection capabilities and surveillance actions. The main action included in the Action Plan was intended to better control the illicit entry of high risk CBRN materials and to optimise the ability to detect such materials at internal level. As a result, alongside the development of minimum detection and sampling standards set by the European Committee for Standardisation (CEN), the strengthening of risk-based customs controls to intercept dangerous CBRN materials at the border has been put at the centre of this specific action, even though the border with prevention may appear blurry. Finally, to further improve coordination and knowledge

46 Ibid art 2.

47 Commission proposal for Regulation to prevent the dissemination of terrorist content online, COM (2018) 640 final.

48 Ibid art 13.

concerning CBRN risks at EU level, the main proposal has been to establish an EU CBRN security network pooling together the efforts of all the CBRN actors at strategic and operational level. It is anticipated that the network will rely on an advisory group bringing together all the CBRN coordinators of the Member States, a support network composed of existing CBRN centres across the EU and a CBRN hub in the European Counter-Terrorism Centre at Europol.

These relevant initiatives of cooperation and coordination are, however, matched with very few obligations. Most of them can be derived from Decision 1082/2013/EU on serious cross-border threats to health,<sup>49</sup> which is also mentioned in Council Decision 2014/415/EU on the implementation of the solidarity clause.<sup>50</sup> Indeed, Decision 1082/2013/EU represents a decisive legislative development with regard to the biological area since it has not only set up provisions to strengthen preparedness and response planning in the EU but has also formalised the role of the Health Security Committee (HSC) established on the basis of the Presidency Conclusions on bioterrorism.<sup>51</sup> Given the Decision's broad material scope of application, notably covering threats of biological and chemical origin, as well as threats of 'unknown origin', this instrument is relevant also when dealing with preparedness against CBRN threats linked to terrorist conduct, even though it is mainly applicable to non-intentional events. In this regard, Member States and the Commission have an obligation to consult with each other within the HSC in order to share best practice and experience on preparedness, as well as promote the interoperability of national preparedness planning. To meet this obligation, every three years Member States must provide the Commission with an update on the latest situation at national level.<sup>52</sup> Moreover, Member States must inform the Commission in a timely manner of the main aspects of any revisions they make to their preparedness planning at national level, with particular focus on cross-border dimensions of revisions.<sup>53</sup> For its part, the Commission must adopt templates to be used by the Member States when sending the

49 Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC, OJ 293/1 of 5.11.2013. As extensively reported by Ferri (ch 19), the Commission has recently proposed replacing Decision 2013/1082 with a Regulation. See, Proposal for a Regulation of the European Parliament and of the Council on serious cross-border threats to health and repealing Decision No 1082/2013, COM(2020) 727 final. For further details on the content of Decision 1082/2013, see ch 19 by Ferri.

50 Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, OJ L 192/53 of 1.7.2014.

51 Presidency Conclusions on bioterrorism, Doc. 13826/01.

52 Decision No 1082/2013/EU (n 49), art 4(2).

53 Decision No 1082/2013/EU (n 49), art 4(3).

information and make them available to the members of the HSC.<sup>54</sup> Over recent years, cooperation within the HSC has led to an improvement in cross-sectoral training activities, with the involvement of various stakeholders, as well as the creation of a CBRN detection pool. Moreover, Member States have been encouraged to commit new CBRN capacities to the European Emergency Response Capacity (EERC), especially the EU Medical Corps for dealing with biological threats, within the framework of the EU Civil Protection Mechanism.<sup>55</sup> The EU Civil Protection Mechanism represents another practical and effective way for implementing a cooperative approach and is dealt with by Ferri in Chapter 19 of this book.

### 3.3 *Obligations of Response against CBRN Threats*

The EU legal framework on response to CBRN hazards is composed of different instruments setting out modalities for responding to emergency situations when they potentially pose a serious cross-border threat to health and when public health measures taken to counter that threat are insufficient to ensure a high level of protection of human health.<sup>56</sup> The response framework covers interventions from the period immediately before the occurrence of the CBRN event through to the response to and recovery from the incident.

Moving on to more specific terms, Article 9 of Decision 1082/2013 sets an obligation for the national authorities of the Member States to submit an alert notification through the Early Warning and Response System (EWRS) in the event of a serious cross-border threat to health in order to ensure that the other States and the Commission are duly informed in a timely manner.<sup>57</sup> The national authorities are also required to communicate through the EWRS

54 The template to be used by the Member States when providing the information on their preparedness and response planning in relation to serious cross border threats to health is included in Commission Implementing Decision 2014/504/EU of 25 July 2014 implementing Decision No 1082/2013/EU of the European Parliament and of the Council with regard to the template for providing the information on preparedness and response planning in relation to serious cross-border threats to health, OJ L 223/25 of 29.7.2014. According to the Report on the implementation of Decision 1082/2013/EU, made available on 7 December 2015, as of 23 October 2015, 26 EU Member States and one EEA country provided the requested information. Since then, however, no other reports have been issued and only a workshop on the state of play of preparedness on serious cross-border threats to health in the EU was organised in 2018.

55 For analysis of the civil protection tools in the context of CBRN, see ch 19 by Ferri.

56 Decision No 1082/2013/EU (n 49), Preamble, point 9.

57 From 5 November 2013 until 4 September 2015, a total of 168 messages were posted with 354 comments. Of the remaining messages, 90 were alert notifications and 78 were information messages. See, EU Monitor, Explanatory Memorandum to COM(2015) 617.

any available relevant information that may be useful for the coordination of the response, including some details that are particularly applicable also to CBRN threats: (a) the type and origin of the agent; (b) the date and place of the incident or outbreak; (c) means of transmission or dissemination; (d) toxicological data; (e) detection and confirmation methods; (f) measures other than public health measures that have been implemented or are intended to be taken at the national level.<sup>58</sup> It must be noted, however, that the obligation to issue an alert notification only applies in extreme situations: the notification is required only where the scale and severity of the threat concerned are or could become so significant that they affect or could affect more than one Member State and require or could require a coordinated response at the Union level.<sup>59</sup>

Where an alert has been notified, Member States have an obligation to consult each other within the HSC and in liaison with the Commission with a view to coordinating the national responses, as well as the risk and crisis communication to the public and to healthcare professionals. Then, the Commission shall adopt the procedures necessary for the uniform implementation of the required information exchange, consultation and coordination (Article 11). Such a basic obligation is further reinforced by the specific obligation of mutual assistance which requires other Member States' competent authorities to provide assistance to a State affected by one of the serious events outlined in Council Decision 2008/615/JHA, in compliance with the affected State's consent and its national law. The measures of response to be adopted include not only the notification of the serious situation and the coordination of the measures but also the dispatching of officers, specialists and advisers and supplying equipment, at the request of the Member State within whose

58 The provision also refers to the Commission's obligation to make available to the Member States' national authorities, through the EWRS, any information that may be useful for coordinating the response, including information transmitted through rapid alert and information systems established under other provisions, including the Common Emergency Communication and Information System (CECIS), a web-based alert and notification application enabling a real-time exchange of information. The specific obligations concerning the early exchange of information in the event of a radiological and nuclear emergency are discussed in ch 15 by Balboni.

59 Decision No 1082/2013/EU (n 49), Preamble, point 16. While not mentioned by Decision 1082/2013, the general procedure of notification should also take into account the content of Regulation 178/2002, requiring the Member States to notify the Commission of a direct or indirect risk to human health deriving from food or feed under a rapid alert system primarily addressed to the European Food Safety Authority. See, Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31/1 of 1.2.2002, art 50.

territory the situation has arisen.<sup>60</sup> To link the response phase to the process of criminalisation, thus closing the circle of emergency management, it deserves to be mentioned that, according to Decision (CFSP) 2018/154, the Council may impose sanctions on persons in the form of banning travel to the EU and freezing their assets, and on entities in the form of freezing assets, where they are directly or indirectly involved in the use and proliferation of chemical weapons.<sup>61</sup> Pursuant to this Decision and in light of the fact that under the Chemical Weapons Convention any poisoning of an individual through the use of a nerve agent is considered a use of chemical weapons,<sup>62</sup> following the assassination attempt on Alexei Navalny, the Council adopted restrictive measures against six persons and one entity.<sup>63</sup>

Going beyond the response phase and towards the recovery one, Title v of Directive 2017/541/EU introduces a set of obligations of recovery for the Member States *vis-à-vis* the victims of terrorism.<sup>64</sup> According to Article 24, the Member States shall ensure the provision of support services addressing victims' specific needs, including (a) emotional and psychological support; (b) provision of advice and information on any relevant legal, practical or financial matters, including facilitating the exercise of the right to information; (c) assistance with compensation claims for victims of terrorism, under the national law of the Member State concerned. Moreover, Article 24, para 4, stresses that the specialist support services are to be provided immediately

60 Council Decision 2008/615/JHA (n 44), art 18.

61 Decision (CFSP) 2018/154 (n 42), art 2. On 12 October 2020, the Council decided to extend the regime allowing the EU to impose restrictive measures on persons and entities involved in the development and use of chemical weapons by one year, until 16 October 2021.

62 For the position of the EU institutions, see European Parliament resolution of 17 September 2020 on the situation in Russia: the poisoning of Alexei Navalny (2020/2777(RSP)), 17 September 2020; Outcome Document 11598/20 of the 3774th Council meeting Foreign Affairs, Brussels, 12 October 2020.

63 Council Decision (CFSP) 2020/1482 of 14 October 2020 amending Decision (CFSP) 2018/1544 concerning restrictive measures against the proliferation and use of chemical weapons, OJ L 341 of 15.10.2020.

64 According to art 2, para 1, of Directive 2012/29/EU, 'victim' means: (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death. See, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57 of 14.11.2012.

after an attack and for as long as necessary.<sup>65</sup> This is a significant aspect in the case of CBRN attacks where, unlike with the use of conventional weapons, the effects may not be immediately manifest, and a long term follow up and treatment might be necessary. Finally, Member States are required to adopt measures to protect victims of terrorism and their family members (Article 25), as well as to guarantee that the victims of terrorism resident in another Member State are informed about the support services and compensation schemes available in the Member State where the terrorist offence was committed (Article 26).

#### 4 Instruments of External Cooperation in the CBRN Domain

The investigation of the EU legal framework concerning CBRN threats related to terrorism cannot be complete without an overview of the external dimension.<sup>66</sup> In the CBRN domain, the demand of enhanced cooperation with third countries and strategic partners requires paying special attention to the NATO framework and the EU Global CBRN Centres of Excellence.<sup>67</sup>

In 2010, NATO's New Strategic Concept<sup>68</sup> recognised the threat posed by terrorists' capacity to use modern technologies, including CBRN assets. In order not to compete with NATO in the EU's own capacity-building initiatives and to avoid duplication of efforts, common and coordinated efforts to counter hybrid threats have been defined. During the EU-NATO summit held in Warsaw in 2016,<sup>69</sup> the parties decided to boost the ability to counter hybrid threats and considered a series of proposals on the implementation of measures in this regard, especially in the preparedness phase. The main proposals comprised

65 For comments, J Maliszewska-Nienartowicz, 'A New Chapter in the EU Counterterrorism Policy? The Main Changes Introduced by the Directive 2017/541 on Combating Terrorism' (2017) 37 *PolishYIL* 185.

66 Comprehensive Assessment of EU Security Policy, accompanying the document: Communication from the Commission to the European Parliament, the European Council and the Council – Ninth progress report towards an effective and genuine Security Union, COM(2017) 407 final.

67 J Sabol et al, 'Current Activities of the European Union in Fighting CBRN Terrorism Worldwide', in S Apikyan and D Diamond (eds), *Nuclear Threats and Security Challenges* (Springer 2015) 157.

68 Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization, Adopted by Heads of State and Government at the NATO Summit in Lisbon 19–20 November 2010, 11. See also ch 8 by de Guttery.

69 Joint Declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization.

the strengthening of staff-to-staff cooperation on civil preparedness, including risk assessments, medical evacuation, mass casualty incidents, and population movement, as well as harmonising practice and procedures, and exploring the inclusion of EU staff in the NATO Resilience Advisory Support Teams and of NATO staff in relevant EU advisory prevention and preparedness missions.

Following the Warsaw Joint Declaration, eight EU Member States and the US established the European Centre of Excellence for Countering Hybrid Threats (Hybrid CoE).<sup>70</sup> The Memorandum of Understanding (MoU)<sup>71</sup> created this hub of expertise to support individual and collective efforts to enhance civil-military capabilities, resilience, and preparedness to counter hybrid threats. This is in line with the broader idea of including CBRN threats under the umbrella of hybrid threats posed by States and non-State actors, recognised by the Commission and the High Representative.<sup>72</sup> The Hybrid CoE is intended to be a platform for sharing best practices, building capability and testing new ideas on defence against hybrid threats, as well as to act as a neutral facilitator between the EU and NATO through strategic, scenario-based discussions and exercises. However, as expressly stressed in Section 15 of the MoU, no rights and obligations for the Parties are established and so the Hybrid CoE only represents a formal instrument of cooperation at supranational level.

Besides this forum, the EU has established a Centre of Excellence specifically dedicated to the improvement of cooperation with third countries in the CBRN domain. The origins of the so-called CBRN CoE initiative can be found in the Instrument for Stability and it now fits within the Instrument contributing to Stability and Peace (IcSP).<sup>73</sup> Pursuant to Article 5, para 18(b) of the IcSP Regulation, it contributes to CBRN risk mitigation and capacity building measures in partner countries and allows the EU to fund CoE projects covering accidental, natural and intentional risks. In a broader perspective, such a program is aligned with the EU's commitments as a responsible global actor, not only with respect to the promotion of 'stronger multilateral cooperation'<sup>74</sup>

70 For comments, E Nexon and C Wachtel, *EU preparedness against CBRN weapons*, European Parliament Study, 2019.

71 Memorandum of Understanding on the European Centre of Excellence for countering hybrid threats, 11 April 2017.

72 Joint Communication of the European Commission and the High Representative for Foreign Affairs and Security Policy to the European Parliament, the European Council and the Council, Increasing resilience and bolstering capabilities to address hybrid threats, JOIN(2018) 16 final.

73 Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace, OJ L 77/1 of 15.3.2014.

74 Art 21(h), TEU.



for addressing global peace and security challenges but also with respect to the assistance of ‘populations, countries and regions confronting natural or man-made disasters’.<sup>75</sup>

The methodology of the CoE is based on a soft nature in terms of institutionalisation and is built on the national systems developed by the partner countries themselves which participate on a voluntary basis. At the moment, the regional Centres cover 62 countries in eight regions and are facilitated by a Regional Secretariat. From an operational point of view, the initiative is taken forward jointly by the EEAS, DG Development and Cooperation – EuropeAid, and the Joint Research Centre, while its implementation is supported by the United Nations Interregional Crime and Justice Research Institute. All the projects implemented are intended to deal with the individual phases of the CBRN risk management cycle and they may be adapted to cover any geographical area or type of CBRN risk.

According to the last report issued by the Court of Auditors,<sup>76</sup> the CoE initiative has contributed to mitigating CBRN threats, but many challenges remain, especially from the EU side, which has not properly and fully implemented the Court’s previous recommendations.<sup>77</sup> In particular, the EU delegations’ limited involvement in promoting the initiative does not sufficiently guarantee the long-term, robust cooperation that results in the elaboration of effective national action plans. Moreover, from the partner countries’ side, their interaction, with the EU and with each other, concerning CBRN risk mitigation capacities is limited by the irregular organisation of meetings and discussions on guidelines, best practices and lessons learned. In light of the suggestions made by the Court of Auditors, one could expect to see further development of cooperative regional projects, thus creating a constant political and operational dialogue on new priorities and targets with other third countries.

## 5 Concluding Remarks

The present chapter has presented an overview of the evolution of the approach at EU level towards CBRN threats in the field of counter-terrorism. While the letter represents a national domain, the concept of cooperation

75 Art 21 (g), TEU.

76 European Court of Auditors, ‘The EU Chemical, Biological, Radiological and Nuclear Centres of Excellence: more progress needed’, 2018.

77 European Court of Auditors, ‘Can the EU’s Centres of Excellence initiative contribute effectively to mitigating chemical, biological, radiological and nuclear risks from outside the EU?’, 2014.

among the Member States and the Union has steadily expanded, thereby becoming the broader ‘container’ for a variety of specific legal obligations. In particular, the CBRN Action Plans have introduced an all-hazards approach, major coordination and information sharing mechanisms, capacity building, joint exercises, and sharing of best practices by the Member States, with the support of the EU institutions. Over the years, a dense coordinating network with third countries and NATO partners has also been established, demonstrating how the internal dimension of protection and preparedness must be complemented by the external one. Alongside soft mechanisms of intervention, essentially based on the willingness of the participating Member States and thus not backed by strong enforcement measures, primary law has helped to extend the scope of action at EU level in this domain by justifying the adoption of secondary law acts. However, a specific act dealing with CBRN terrorism is still lacking and the main obligations upon the Member States on this issue are derived from various other instruments that were mainly developed for addressing other policy issues, especially cross-border health threats, but that also contain measures relevant to tackling the CBRN terrorist threat. It is also interesting to note that, while the CBRN Action Plans are intended to develop instruments of prevention, preparedness and response that may apply to any potential event, including events of a wholly internal character, the essential prerequisite for imposing obligations upon the Member States is precisely the cross-border nature of the threat. In any case, except for the duty to punish terror-related offences in domestic law, the other obligations can be classified as obligations of cooperative conduct aimed at establishing a more coordinated framework in accordance with the principle of loyal cooperation. Ultimately, since it is challenging to obtain detailed and transparent information on the effective implementation of the envisaged mechanisms by States and on their respect for the related obligations because of the national security concerns at stake, the more viable choice seems to be to rely on the cooperative attitude of the States rather than on well-structured and imposed monitoring instruments.

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